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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6011

WENDELL L. SHAFFER and MARJORIE M. SHAFFER,
Petitioners

v.

ROBERT C. WILSON, Special Agent of the Internal Revenue Service; T. PAUL BACHMAN, Special Agent of the Internal Revenue Service; NEAL MULDOON, Special Agent of the Internal Revenue Service; JAMES L. TREECE, United States Attorney; and the UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1975.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Wendell L. Shaffer and Marjorie M. Shaffer, pray for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A p. 1a) is not yet reported. The opinion of the District Court (Appendix B, p. 19a) is reported at 383 F.Supp. 554 (D. Colo. 1974).

JURISDICTION

The Court of Appeals entered judgment on May 23, 1975.

A timely petition for rehearing was denied on September 8, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an individual's privilege against self-incrimination protects him from forcible seizure by warrant of his private books and papers as evidence of possible income tax violations: a question left open by *Warden* v. *Hayden.*

2. Whether the Fourth Amendment requirement of specificity was violated by a search warrant for ". . . fiscal records relating to income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources including but not limited to . . . [list] . . . and diverse [sic] other records of financial transactions . . .".

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment of the United States Constitution, in pertinent part:

> "No person . . . shall be compelled, in any criminal case, to be a witness against himself; . . ."

Fourth Amendment of the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated;

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and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18 U.S.C. § 3103a.

"Additional grounds for issuing warrant

"In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States.

Rule 41(b), Federal Rules of Criminal Procedure:

"(b) Property Which May Be Seized with a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense."

STATEMENT OF THE CASE

At 8:00 A.M. October 22, 1971, a squad of Special Agents of the Internal Revenue Service executed a search and seizure at the dental offices of petitioner Dr. Wendell L. Shaffer, a sole practitioner in Colorado Springs, Colorado. Acting under a warrant to search for and seize all ". . . fiscal records relating to income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources . . ." [1], the Agents spent over

[1] See Appendix C, p. 36a.

seven hours collecting papers and records from file cabinets, desks and closets allegedly attempting to segregate and seize only documents within the scope of th warrant, and took away with them 18 boxes of documents.

Dr. Shaffer and his wife sued in the United States District Court for the District of Colorado, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 1331, for return of this property, suppression as evidence of seized material or its fruits, and damages. The District Court granted a preliminary injunction, but, after considering affidavits and briefs from both sides, granted summary judgment for the defendants on the sole ground that the search and seizure was proper.

The Shaffers then appealed to the Tenth Circuit Court of Appeals contending that the seizure of their private papers violated their Fifth Amendment privilege against self-incrimination and their Fourth Amendment security against unreasonable search and seizure since the warrant was overbroad and its execution more so.

A divided panel of the Tenth Circuit affirmed. Over a strong 13-page dissent, the majority held that the forcible seizure under warrant did not constitute compulsion for Fifth Amendment purposes, and that the Fourth Amendment overbreadth-lack of specificity claim was without merit.

The Shaffers now petition for certiorari.

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REASONS TO GRANT CERTIORARI

To Consider Question 1

SUMMARY

I. This Court has just granted certiorari on substantially the same question arising in a state prosecution.

II. The Court of Appeals for the Tenth Circuit has decided an important question of federal law which has not been, but should be settled by this Court: the applicability of *Warden* v. *Hayden* to private papers seized under warrant in income tax investigations.

III. The Tenth Circuit decision directly conflicts with a decision of the Seventh Circuit and no other circuit has squarely decided the question.

IV. The Tenth Circuit's reasoning appears to conflict with applicable decisions of this Court.

I

This Court has just granted certiorari to consider substantially the same Fifth and Fourth Amendment issues arising in a State prosecution. *Andresen* v. *Maryland,* No. 74-1646 *cert. granted,* October 6, 1975. The instant case presents the question in the context of federal agents under federal law.

II

A. Forced Self-Incrimination in Income Tax Investigation.

The court below held that the government may use the forcible, *ex parte,* search warrant procedure to seize from an individual private papers unreachable by summons or subpoena. If this becomes the law, investigation of income tax offenses will change drastically and individual rights will be substantially weak-

ened. Citizens as well as those charged with administering the tax laws need this Court's consideration of the question.

For decades IRS investigators have conceded that an individual taxpayer could not be forced to incriminate himself by seizure of his private papers:

> "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States,* 116 U.S. 616, 633 (1886).

The pattern of income tax investigation has been to assemble audit data using non-private sources, tax returns, bank and business records, etc. to confirm or disprove early indication of income tax law violation. If direct evidence was unavailable from such sources, a net worth or bank deposit computation was available; the use of such circumstantial evidence to establish unreported income was sanctioned by this Court in *Holland* v. *United States,* 348 U.S. 121 (1953), and has been quite successful in income tax prosecutions.

Recently the IRS began a novel, experimental use of search warrants as an income tax enforcement tool, exploring the limits of governmental authority to seize "mere evidence" established in *Warden* v. *Hayden,* 387 U.S. 294 (1967). Should the decision of the Tenth Circuit become the law of the land, income tax investigators can sidestep the individual taxpayer's Fifth Amendment privilege by the simple expedient of seizing all his private records under a search warrant. Unlike the situation in most crimes involving individuals, in income tax cases the safeguard of probable cause is of little protection: because of the complexity

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of income tax investigation, suspicion and probable cause are essentially equivalent, *e.g.* a man is living high and reporting low, *See Jaben* v. *United States,* 381 U.S. 214 (1965),[2] even though a man's entire financial life over many years must be scrutinized to reach a valid conclusion. In the instant case, ex-employees surmised that Dr. Shaffer was underreporting and their accusations were the probable cause. The agents then seized all the dentist's records to test the accusations.

Summons procedure, with its prior adversary hearing, is constitutionally ineffective to compel production of private papers over a claim of the privilege even on a showing of probable cause. The privilege will become meaningless in the summons area as well if agents can demand private papers with the implicit threat that if the papers are not forthcoming "voluntarily", forcible seizure will follow. *See* footnote 9 to the Court's opinion in *Schmerber* v. *California,* 384 U.S. 757, 765 (1966).

In an income tax case every private paper in the individual's possession would be involved since all his income and expense over a period of years are of possible interest. Such an intrusion is drastic, unnecessary, and, from the individual's point of view, abhorrent.

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[2] ". . . Some offenses are subject to putative establishment by blunt and concise factual allegations, e.g., '*A* saw narcotics in *B*'s possession,' whereas '*A* saw *B* file a false tax return' does not mean very much in a tax evasion case. Establishment of grounds for belief that the offense of tax evasion has been committed often requires a reconstruction of the taxpayer's income from many individually unrevealing facts which are not susceptible of a concise statement in a complaint." 381 U.S. at 223-224.

The Solicitor General thought that resolution of this issue was desirable in the area of income tax investigations when he petitioned for certiorari in 1971.[3] With increasing use of warrant-based seizure in this area, resolution is all the more desirable now. Law enforcement officers are entitled to know what their constitutional authority is to be in the seizure of "mere evidence".

B. The Limits of Warden v. Hayden

The problem exemplified in this case flows from this Court's decision in *Warden* v. *Hayden, supra,* which finally ended the doctrine that items not instrumentalities or fruits of crime nor contraband, *i.e.,* "mere evidence", were not subject to seizure under appropriate Fourth Amendment procedure. That decision left open the question whether the Fifth Amendment privilege against self-incrimination forbids seizure of testimonial or communicative items. In *Warden* v. *Hayden, supra,* the Court approved a seizure of items of clothing of evidentiary value:

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *State of California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. *This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."* 387 U.S. at 302-303. (Emphasis added)

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[3] Petition to Review *Hill* v. *Philpott,* 445 F.2d 144 (7th Cir.) *cert. denied,* 404 U.S. 991 (1971).

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No doubt exists that the items seized in this case are "testimonial" and "communicative" in the sense of *Warden* v. *Hayden, supra,* and *Schmerber* v. *California,* 384 U.S. 757 (1966); the problem, therefore, is squarely presented.

The principle of *Warden* v. *Hayden, supra,* has been embodied in Rule 41(b), Federal Rules of Criminal Procedure, as well as Section 3103a of Title 18, United States Code, providing that search warrants may be issued to search for and seize "mere evidence". The Notes of the Advisory Committee on Criminal Rules explicitly deny any intention to limit the protection of the Fifth Amendment, preferring to allow the courts to develop the Fifth Amendment limitation as cases arise. *Proposed Amendments to Criminal Rules,* 48 F.R.D. 553, 629-630.

III

Circuit Conflict

Circuits are in conflict over the problem of seizure of "testimonial" or "communicative" objects since *Warden* v. *Hayden, supra.*

The Seventh Circuit has squarely held that an individual's books and records of a legitimate business are not subject to seizure in an income tax investigation.[4] *Hill* v. *Philpott,* 445 F.2d 144 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971). With the present case, the Tenth Circuit has now held the opposite, that an individual's books and records are subject to seizure. The Seventh Circuit reasoned that the Fifth Amend-

[4] The Ninth Circuit had held with the Seventh Circuit but then withdrew its opinion and declined to rule until a criminal case was filed and the plaintiff moved for suppression. *VonderAhe* v. *Howland,* 508 F.2d 364 (9th Cir. 1974).

ment privilege against self-incrimination forbids seizure; the Tenth says that forcible seizure does not constitute compulsion for Fifth Amendment purposes.

Other Circuits have allowed seizure of specific communicative objects in non-tax cases in which the objects were ancillary to an activity illegal per se. The Second Circuit has upheld seizure of a letter in a drug conspiracy;[5] and index cards in an organized fencing case;[6] the Sixth Circuit, records of illegal gambling business;[7] the Eighth Circuit, a memorandum in a white slavery case;[8] and the Ninth Circuit, an address book in a drug smuggling case.[9] The Seventh Circuit, too, has distinguished illegal business and upheld seizure in an illegal gambling case.[10]

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[5] *United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852, 402 U.S. 984 (1971).

[6] *United States* v. *Scharfman*, 448 F.2d 1352 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

[7] *United States* v. *Blank*, 459 F.2d 383 (6th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972).

[8] *Taylor* v. *State of Minnesota*, 466 F.2d 1119 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973).

[9] *United States* v. *Murray*, 492 F.2d 178 (9th Cir. 1973), *cert. denied*, 419 U.S. 854 (1974).

[10] *Romanelli* v. *Commissioner*, 466 F.2d 872 (7th Cir. 1972).

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enforcement zeal, warrants, such as the one in this case, calling for seizure of items described only by the requirement that they be evidence of some fact, nullify the Fourth Amendment requirement of specificity of the things to be seized.

Guidelines are needed. Allowing seizure of anything which one of the searching officers may think might be evidence leads to the abuse the Amendment was designed to avoid, the general rummaging about among a man's effects to secure evidence against him. *United States* v. *Poller,* 43 F.2d 911 (2d Cir. 1930) (L. Hand).

On the other hand, law enforcement officers need to know the limits of their constitutional authority. Officers drafting warrants should have guidance in knowing how to specify what is to be seized; magistrates and reviewing courts need guidance to determine which warrants are valid; officers executing the warrant should have guidance in knowing what they can seize under the authority of the warrant.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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October, 1975.

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IV

Conflict with Decisions of the Supreme Court.

The opinion of the majority of the panel below relies essentially on the argument attributed to Dean Wigmore [11] that forcible seizure by government agents does not constitute compulsion in the Fifth Amendment sense. This reasoning appears to conflict with the reasoning of *Schmerber* v. *California*, 384 U.S. 757 (1966). The opinion of *Schmerber* assumed compulsion and distinguished testimonial from non-testimonial objects.

The opinion of the Tenth Circuit also relies on the reasoning that business records are less protected than more personal private papers; this reasoning appears to conflict with the Statement in the opinion in *Bellis* v. *United States*, 417 U.S. 85 (1974), that the privilege against self-incrimination applies to business records of a sole practitioner as well as to more intimate personal documents.

REASONS TO GRANT CERTIORARI

To Consider Question 2

The problem of overbreadth and lack of specificity in the warrant in this case lies primarily in the fact that the agents executing the warrant were required to exercise their own judgment of what to seize. Under the description "fiscal records relating to income and expenses . . .", if the agents are to conscientiously search for such records, they will examine every scrap of paper or record on the premises and what constitutes records relating to, or evidence of, financial transactions for years under scrutiny is limited only by an agent's imaginative correlation and deduction. In law

[11] 8 Wigmore, *Evidence*, §§ 2263-64 (McNaughton Ed. 1961).

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1671

WENDELL L. SHAFFER and MARJORIE M. SHAFFER,
Appellants,

v.

ROBERT C. WILSON, Special Agent of the Internal Revenue Service; T. PAUL BACHMAN, Special Agent of the Internal Revenue Service; NEAL MULDOON, Special Agent of the Internal Revenue Service; JAMES L. TREECE, United States Attorney; and the UNITED STATES, *Appellees.*

Appeal from the United States District Court
for the District of Colorado
(D.C. No. C-5039)

Heard on the Briefs only.

Leslie H. Wald and Dale W. Haines. Denver, Colorado, for Appellants.

Scott P. Crampton, Assistant Attorney General, Washington, D. C.; Gilbert E. Andrews, Robert E. Lindsay, and Daniel F. Ross, Tax Division, Department of Justice, Washington, D. C.; Of Counsel: James L. Treece, United States Attorney, Denver, Colorado, for Appellees.

Before SETH, MCWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Dr. Wendell L. and Marjorie M. Shaffer (Shaffers) appeal from an adverse summary judgment order[1] entered in favor of several special agents of the Internal Revenue Service and the United States.[2]

Dr. Shaffer is a dentist residing in Colorado Springs, Colorado, where he has practiced alone since 1960. His wife, Marjorie, is his receptionist. On Friday, October 22, 1971, at approximately 8:00 A.M. appellees served a search warrant on Dr. Shaffer. The warrant authorized the search of his office for fiscal business records relating to his income and expenses. After serving the warrant, the appellee agents serched his office and seized numerous records and documents.

On May 24, 1973, Shaffers filed an action under Rule 41 (e), Fed.R.Crim.P.[3] and 28 U.S.C.A. § 1331 seeking return of their property; suppression of any evidence obtained; injunctive relief; and damages. After granting Shaffers a preliminary injunction on July 5, 1973, the Trial Court, following motions for Summary Judgment filed by both

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[1] Reported below at 383 F. Supp. 554 (D. Colo. 1974).

[2] Hereinafter collectively referred to as "appellees".

[3] Rule 41(e) provides in part:

> (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed.

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parties, did, upon reviewing the briefs and affidavits, enter summary judgment for appellees.

The Court found that the search and seizure was proper; that there was no "compulsion" here in the Fifth Amendment sense; that the Fourth Amendment requirements for obtaining a warrant were complied with in all respects so as to protect Shaffers' rights; that the articles seized were business records and not private papers; that the business records were records of which others must have knowledge; and that since the search was proper, Shaffers were not entitled to damages.

On appeal, Shaffer contends that: (1) the seizure of the private papers of a dentist practicing as a sole practitioner violated his privilege against self-incrimination; and (2) the search and seizure was unreasonable under the Fourth Amendment.

I.

Shaffers contend that the seizure of a dentist's private papers under a search warrant is violative of his Fifth Amendment privilege against compulsory self-incrimination. In support thereof, they rely on Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), cert. denied 404 U.S. 991 (1971), and Vonder Ahe v. Howland, 508 F.2d 364 (9th Cir. 1974).

In *Hill* the Court held that personal books and records of suspected tax evaders cannot be obtained by search warrant because of the Fifth Amendment prohibition against compulsory self-incrimination under circumstances whereby such books and records could have been refused under the Fifth Amendment privilege if they had been sought by subpoena or summons. The Court did not, however, distinguish between the "compulsion" aspect presented via a subpoena or summons, if such there be, and the lack of same under a search warrant.

In *Vonder Ahe*, the Court, in citing to *Hill*, held that there was no probable cause under a general search war-

rant for the indiscriminate seizure of all of a dentist's books, records, personal and private papers. We readily agree that a general search warrant does not afford "carte blanche" to seize *all* records, personal and business. However, in *Vander Ahe,* the Court declined to determine whether the documents seized should be suppressed on Fifth Amendment grounds, inasmuch as there were no civil or criminal proceedings then pending against the plaintiff.

The Trial Court held that neither *Hill* nor *Vander Ahe* controlled the case at bar. We agree. In declining to follow the rationale of *Hill* and *Vander Ahe*, the Trial Court found:

> ——it appears that there was no compulsion in the Fifth Amendment sense, attendant to the search and seizure in this case.

We hold that the Trial Court properly found that "compulsion" (re appellants' Fifth Amendment constitutional rights) was not present here. Significantly, the search warrant was properly executed. Accordingly, appellants' due process rights were fully protected. This holding is consistent with those of other circuits.

In United States v. Bennett, 409 F.2d 888 (2nd Cir. 1969), cert. denied 396 U.S. 852 (1969), a search incident to defendant's arrest produced a letter which incriminated him. The Court held that the letter could be seized in order to determine whether it was an instrumentality for effecting a conspiracy and that the Fourth Amendment right to be free from unreasonable search does not protect against seizure of things whose compulsory production would be forbidden by the Fifth Amendment. This rule was reiterated in United States v. Scharfman, 448 F.2d 1352 (2nd Cir. 1971), cert. denied 405 U.S. 919 (1972), wherein the Court further noted that the seizure of index cards and a

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consignment memorandum book was constitutionally valid, even though the search warrant failed to describe them. The Court reasoned that it was entirely reasonable to assume that the materials were used as instrumentalities in connection with the crime of disposing of stolen fur garments.

In United States v. Blank, 459 F.2d 383 (6th Cir. 1972), cert. denied 409 U.S. 887 (1972), the Court held that worksheets of a sports and horsebetting business seized under an admittedly valid search warrant could not be suppressed, regardless of whether they might be in the defendant's handwriting, since they were not personal communications but rather business accounts of which other persons must have knowledge. The Court observed that the documents were "extraordinary" only because the business itself was illegal. In recognizing the lack of "compulsion" relative to a search warrant, the Court further noted:

> ——there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The warrant involved no such element of compulsion upon an actual or potential defendant.
>
> 459 F.2d at 385.

Blank was followed in United States v. Gargotto, 476 F.2d 1009 (6th Cir. 1973). The Court there held the lawfully seized documents were not subject to suppression in a prosecution for a false wagering excise tax return as violative of one's Fifth Amendment privilege against self-incrimination.

In Taylor v. State of Minnesota, 466 F.2d 1119 (8th Cir. 1972), cert. denied 410 U.S. 956 (1973), the Court denied the defendant's claim that the seizure of an incriminating

memorandum[4] was violative of his Fifth Amendment rights. The Court held that the search in question was "sufficiently specific" so as "not to amount to a general search" and that the evidence failed to establish that the memorandum was obtained by coercion.

In United States v. Murray, 492 F.2d 178 (9th Cir. 1973), cert. denied —— U.S. ——, the Court, in a decision rendered some two years prior to its *Vander Ahe* holding, ruled that the seizure of an address book pursuant to a search incident to an arrest did not violate the defendant's Fifth Amendment privilege.

We accordingly hold that under the facts reflected in the record of this case, and in view of the substantial supportive legal authority, that the seizure of the records herein, pursuant to a valid search warrant, was not violative of Shaffers' Fifth Amendment privilege against self-incrimination. The materials seized were business records of which other persons must have knowledge. *United States* v. *Blank, supra.*

There is no violation of one's Fifth Amendment privilege against self-incrimination by reason of the proper execution of a valid search and seizure. Nor would the privilege be violated upon the execution of a valid search and seizure incident to a lawful arrest predicated on probable cause. Information properly obtained in a non-accusatorial setting does not violate one's Fifth Amendment privilege. Pauldino v. United States, 500 F.2d 1369 (10th Cir. 1974). To hold contrariwise, extending Shaffers' contentions to their extreme, would surely mean that police officers could not seize a gun or other instrumentality of a crime pursuant to a properly issued and validly executed search warrant. If such a rule prevailed, one of the most effective tools in

[4] The memorandum in question instructed the defendant's wife on how to prepare and condition a young woman for service as a member of their stable of prostitutes.

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the enforcement of the criminal justice system would be shackled.[5]

II.

Shaffers contend that the search and seizure was unreasonable under the Fourth Amendment because: the warrant was overly broad in scope; the warrant tells the officers to seize too much; and because the agents went beyond the warrant and seized items not set forth therein, including non-fiscal personal and clinical records. We hold that this contention is without merit. The Trial Court properly found that:

> Moreover, the articles seized by defendants were business records rather than private papers which are "so much a part of personhood that they ought to enjoy a superlative privacy." Hill v. Philpott, 445 F.2d at 150 (dissenting opinion of Judge Fairchild). The affidavits appended to Defendant Wilson's application for a search warrant reveal that at least Plaintiff's employees and former employees had knowledge of these records. Thus, the items seized were not private, but rather "business records of which other persons must have knowledge."

The Fourth Amendment prohibits only an unreasonable search undertaken without a warrant. Terry v. Ohio, 392 U.S. 1 (1968); United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir. 1974), cert. denied —— U.S. ——. The mandates of the Fourth Amendment are complied with

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[5] In so holding we also observe the continued efficacy of Donaldson v. United States, 400 U.S. 517 (1971), wherein the Court held:

> "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

400 U.S. 517 at 536.

See also United States v. Biseeglia, —— U.S. —— (Decided February 19, 1975); United States v. Continental Bank & Trust Company, 503 F.2d 45 (10th Cir. 1974); United States v. Hodgson, 492 F.2d 1175 (10th Cir. 1974).

when there exists a reasonable nexus between the item to be seized and the criminal behavior alleged. Warden v. Haydn, 387 U.S. 294 (1967).

The search warrant herein was not unreasonable under the Fourth Amendment because of overbreadth. The warrant provided, inter alia:

> ——there is now being concealed certain property, namely fiscal records relating to the income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources from January 1, 1966 to December 31, 1970, including, but not limited to, dental patient cards, appointment books, cash receipt books, cash disbursement books, expense records, business ledgers, log books, bank ledger sheets and statements, deposit tickets, cancelled checks, purchase invoices, copies of receipts covering payment of fees, copies of invoices and bills ——, an approximately 5½" by 7", —paper pad—allegedly known as a "cheat book", ——.

The warrant, properly issued and limited in scope to business records as related, *supra*, was predicated largely upon the supporting affidavits of three of Dr. Shaffer's previous employees. These affidavits established unequivocally that: Dr. Shaffer kept a log and a "cheat book"; Dr. Shaffer did not record all of his receipts in his log book; items were recorded in the "cheat book" and not in the log; Dr. Shaffer continually bragged to patients and employees about how he cheated on his income tax returns; Dr. Shaffer wrote checks for services never performed and then took "kickbacks"; and that Dr. Shaffer told an employee to "pad" his supply account expenses.

There was sufficient probable cause to issue the warrant, and the warrant was specific in relation to the items to be seized. We hold that the warrant, as issued and as executed, was not violative of Shaffers' Fourth Amendment rights.

AFFIRMED.

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No. 74-1671—WENDELL L. SHAFFER et al. v. ROBERT C. WILSON, et al.

SETH, Circuit Judge, dissenting:

The record shows that appellants knew that an examination of their income tax returns was under way, but, of course, no charges had been filed nor other steps short thereof had been taken by the Internal Revenue Service. The warrant for the search and seizure was based on affidavits by former employees. The facts therein contained have not been proved or disproved at this point. In this proceeding the warrants and affidavits are accepted at face value for the limited purpose of testing the validity of the search.

The search warrant in its operative portion, after a listing of all possible financial and patient records, books, and accounts, states: ". . . and diverse other records of financial transactions."

The warrant was executed by some six or eight agents appearing at the dental office of appellant, Wendell L. Shaffer, where he practiced by himself, at or shortly before he opened it for the day. This group of agents remained there for about seven hours going through all the records in the office, emptying the file cabinets, desk drawers, and closets. The papers seized were placed by the agents in some eighteen boxes and hauled away. The dentist had appointments for the day but could not continue. Clinical records, patient x-rays, and correspondence were removed. The brief of the Government states that: "The special agents attempted to segregate and seize only documents described in the warrant." Some patient records were copied during the course of the search so that the dentist could, as the Government says, ". . . carry on his practice." The originals of the documents seized have been returned to the appellants, but the IRS has retained copies. The appellants thus seek return of the copies, suppression of

the information seized, and damages. The trial court granted the motion of the IRS for summary judgment.

This case apparently represents a practice of the IRS developed following the decision in Warden v. Hayden, 387 U.S. 294. The legality of the device is apparently being litigated and has been litigated by the IRS in a number of Circuits with varying results.

With the decline of the "mere evidence" rule as a consequence of its being consumed by the exceptions made possible to a large extent by Marron v. United States, 275 U.S. 192, and by the infinitely expandable category of "instrumentalities," there was really not much left by the time *Warden* was decided except the formality. The rule as a doctrine had been destroyed, but the full extent of the consequences of its demise are now being explored. The severity of the impact of the change as far as recorded history of the IRS is concerned is described quite vividly in Hill v. Philpott, 455 F.2d 144 (7th Cir.); United States v. Bennett, 409 F.2d 888 (2d Cir.); United States v. Blank, 459 F.2d 383 (6th Cir.), and in VonderAhe v. Howland, 508 F.2d 364 (9th Cir.). The description of the warrants used in the searches and seizures considered in these opinions brings into focus some of the background material or historical "blurbs" currently being provided by the Bicentennial authorities.

In Warden v. Hayden, the Court stated that there was no Fifth Amendment problem. There eyewitnesses to a robbery followed the defendant to a point where he entered a house; within minutes the police arrived, entered the house, found the defendant, and found in a washing machine the clothing the robber was described as wearing. The clothing was the matter in issue. The Court in the *Warden* opinion traces the rise and fall of the "mere evidence rule," and makes very clear a shift away from attention to "property" and directed the consideration to "privacy." This importance of "privacy" is a pointed reiter-

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ation of such a factor mentioned in other opinions on related issues. This is an important element of the opinion generally, and it relates to our problem. Furthermore the opinion in *Warden* indicates that some things by their very nature may be precluded from search and seizure under a warrant. Thus there are some "things" which can always be reached by a search warrant and some other "things" which can never be reached; this all apparently under the Fourth Amendment. The *Warden* opinion also mentions another important concept in its reference to "nexus."

To consider the last mentioned element in *Warden*, that is "nexus" requirement or doctrine, it must be noted under the facts of *Warden*, with the hot pursuit, the officers were obviously looking for a described person, the weapons used in the robbery (or others which might endanger the officers), the clothing worn by the robber, and the loot, but not necessarily in that order or any other order. Thus the "nexus" problem was, as far as the clothing was concerned, a clear one and one easily resolved on the ground by the officers making the search. The connection of the clothing with the defendant and with the crime, and the nature of the crime was direct. In the case before us, the "nexus" problem arises in the need expressed by the description in the warrant of the items to be searched for, and again in the execution of the warrant by the seizure. The six or eight agents making the seizure could not be in a position, as were the officers in *Warden*, to make a decision on the connection between the items seized and the crime, and this was supposed to have been done for them by the description in the warrant, but it was not, and probably could not have been done. In the tax case, apparently envisioned by the IRS here, *all* records of the taxpayer would have to be examined in detail by experts in making a decision as to what would be useful in proving a case, together with other outside information as required, and

the many other complicated factors and judgment going into the preparation of the case. At the time of seizure no one really knew what would be useful short of "everything," thus the general warrant and the general seizure.

The Government in its brief acknowledges the fact that the needs were unknown when it states:

> "Without complete knowledge of the exact type of records which were maintained, and without particular knowledge of all the records which might reveal the alleged tax evasion scheme, no more specification than that provided here was possible."

Thus the Government says that because it did not know what might be found, it was necessary to include virtually everything with the concluding phrase in the warrant, ". . . and diverse other records of financial transactions." This obviously put the problem to the searching agents to resolve as best they could the "nexus" problem since it was not solved by the official who secured the warrant. It is perfectly obvious that no one could do so at the time because the search was in the hopes of finding something useful as a basis for preparing a case. A general warrant was thus thought necessary. A writ of assistance would have served as well. The time consumed by the agents in making the search is of some significance on this pint. When we consider the fact that six or eight agents spent seven hours in the office of a single practitioner, it is apparent that the *search* portion of the execution of the warrant was a monumental undertaking. The nexus problem had been passed to them and they were doing their best to solve it on the ground because again no one really knew what was needed nor what they would find, as the Government itself indicates. A *search* under these circumstances has to be unreasonable. For all practical purposes the scope of both the search and of the seizure had to be determined on the ground by the agents making the search to try to meet the nexus standard and to attempt to make

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a case. This situation cannot be in conformity with the Fourth Amendment. This is more than a defect or complaint as to the wording of the warrant; it is a basic fault in the post-Warden method. It is not a search for evidence, but a search for a case.

With such a group of agents spending the amount of time they did in the office examining records, it would be expected that all necessary information would have been obtained by the search itself, which obviously included everything in the office, personal, secret, or whatever, and a *seizure* would be superfluous. But in any event, some eighteen boxes of material were taken away. The record shows that the agents did spend some time making copies of records for the doctor's use. This is an obvious problem with the records of a legitimate business sought to be seized by the IRS. The taxpayer is suspected of using the proceeds from the business but not filing correct returns. The crime is not the business itself or the way it is being conducted, but a secondary act by the taxpayer as to his returns plus a manipulation of the records. All of which suggests that IRS search warrants should be placed in a separate category. The search here was unreasonable under the Fourth Amendment.

The "secondary position" is a significant factor alone, and is also important under the "nexus" requirement of *Warden*. This cannot be the "mere evidence rule" in another guise by reason of the place and time of its birth.

The Court in *Warden* did not particularize as to what 'privacy" referred to. It is most often used in opinions to refer to the nature of the contents of a paper or writing. It is not as frequently used to refer to an area or with a geographical connotation, and sometimes without specifying, as the Court in Camara v. Municipal Court, 387 U.S. 523, in considering the Fourth Amendment said:

> "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safe-

guard the privacy and security of individuals against arbitrary invasions by governmental officials."

The Fourth Amendment appears to be not so concerned with things in its reference to being secure in their homes and effects, and not to what may be revealed in the papers or found in the homes.

The courts, apparently by reason of the way in which the issues reach them, seem to be preoccupied with the "things" seized. The process is to sort these "things" by application of four or five key terms or definitions. Thus the records and things seized are examined, usually at a hearing, are evaluated by their contents, their form and origin, and thereby sorted as properly or improperly seized. There must be many things seized and returned without a recorded contest, and also by an examination by the officers and voluntary return; these do not appear in the digest system. But those that do, with the sorting process completed, we cannot help but wonder where the "privacy" is after such a process. It is a process to find an answer, but the process destroys the reason for seeking an answer.

There must be a "privacy" which surrounds the *search* itself. The Fourth Amendment contemplates some protection from a *search* as an important right. This is just as much a matter of privacy as the document-sorting procedure seeks to protect and perhaps more important. It is useful to again here refer to the magnitude and detail of the search here conducted. Also reference must be made to the *search* in Hill v. Philpott, 445 F.2d 144 (7th Cir.), and in VonderAhe v. Howland, 508 F.2d 364 (9th Cir.). In *VonderAhe* the home of the doctor was searched completely as were the personal effects of the wife, her purse, and the purse of a woman visiting her. It is the search—the entry which is the invasion of personal rights. The forcible entry by strangers is what impinges on: "The

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right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Again if a reference can be made to the Bicentennial, the *invasion* of the home and places of business was a basic problem if we can believe the TV reenactments of the historical events. Furthermore, the privacy and protection of papers and records under the Fourth Amendment had to contemplate papers and books with which employees worked, and in which they made entries. The Amendment does not refer to "secret" matters; "personal" does not mean "secret." Employee participation was just as much a way of life then as it is now, and does not make papers less personal than in substance they may be. The Fourth Amendment cannot refer alone to "personal diaries," which is often the only "personal" example provided in many opinions. Bellis v. United States, 427 U.S. 85, does not make such a distinction.

There are two parts to the Fourth Amendment as its construction and drafting history show. With items precluded under *Warden*, and with the references in Couch v. United tSates, 409 U.S. 322, there can be an unreasonable search under a warrant properly issued and properly executed. These decisions serve to point up again the two segments, the two very different subjects of the two phrases. Additionally, the unreasonable execution of a valid warrant to make the search unreasonable is another aspect of the same division. The Fourth Amendment cannot be fully complied with in every instance by the issuance of a warrant proper in form and thereafter properly executed. *Warden* so indicates.

Boyd v. United States, 116 U.S. 616, has had a difficult time through the years; it has been placed on "waivers," but it is alive and fairly well, and by all appearances it is making a comeback as to some of its basic elements. It

has been referred to, distinguished, and quoted from in several recent opinions of the Court, and treated at some length as recently as Bellis v. United States, 417 U.S. 85. It is important now in its statement of a very practical enclusion. The Court there stated after reference to the much quoted "intimate relationship" between the Fourth and Fifth Amendments:

> "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

With the arrival of the defendant's records at his trial in the hands of the prosecuting attorney, and their offer into evidence before the jury, it can make little difference at that point as to how they got into the Government's possession. They are defendant's records, and it is either stated where they were found or from whose hands they came. It makes no difference which, and it makes no difference whatever how they got to the court house. The impact is the same, and they are attributed to the defendant no matter how they were secured. It is tempting to follow the nice distinctions erected in comparisons of production by subpoena and production by a search warrant. Threse distinctions are very logical, and if the established terminology is followed, the answer automatically appears. However, the categories are clear, are neat and tidy, but they have all the appearances of a typical distinction without a difference. The realities of the situation must lead to an elimination of the great disparity in treatment of the "things" based on such tenuus or nonexistent difference. The Fourth and the Fifth Amendments are each of such great significance that the protection afforded by one should not so easily be eliminated by what is no more than a matter of semantics. The "compulsion" distinction is the principal one referred to above as it fits so well into the therotical differences. The difference between a prospec-

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tive defendant standing at the door watching the agents haul out eighteen cartons of records (there he is "passive" because the warrant says he must be), as compared to a response to a subpoena where he hauls the eighteen cartons out the door himself. The "compulsion" is equally present in both cases. In one case the "defendant" interprets the words in the warrant. This should not lead to the great difference in constitutional protection which the Government urges here and the majority adopts. The whole structure is built on this distincion. The whole argument of the Government is so based.

We considered some basic concepts in *Warden* in Pinelli v. United States, 403 F.2d 998 (10th Cir.), but did not have occasion to touch on the issues here present.

In this dissent I must agree with the majority in Hill v. Philpott, 445 F.2d 144, of the Seventh Circuit, and with VonderAhe v. Howland, 508 F.2d 364, of the Ninth Circuit, both of which are in point. The issues are much the same as are the circumstances of the searches. These are the only two direct and clear authorities on the issue. I would hold that the search was unreasonable under the Fourth Amendment considered above, and was unreasonable through the violation of the Fifth Amendment.

In the opinion in United States v. Blank, 459 F.2d 383 (6th Cir.), where a warrant issued for bookmaking materials, the court sought a middle ground which is not to me attainable. The court in United States v. Bennett, 409 F. 2d 888 (2d Cir.), considered a search incident to an arrest for conspiracy to distribute narcotics. The opinion is based on an assumption that there can be no things which by their very nature are precluded from search and seizure. This to me is contrary to *Warden*. The court also bases its conclusion in part on the distinction between "compulsory" production and a search discussed above, and the "mere evidence" distinction.

The majority opinion in the case at bar in stating: "There is no violation of one's Fifth Amendment privilege against self-incrimination by reason of the proper execution of a valid search and seizure," takes an extreme position that there can be no connection between the Fourth and the Fifth Amendments. With this, I cannot agree. Nor can I agree with the statement in the majority opinion that: "The Fourth Amendment prohibits only an unreasonable search undertaken without a warrant," citing Terry v. Ohio. To me the "intimate relationship" between Fourth and the Fifth Amendments described in *Boyd* still exists. Into this relationship between the separate considerations in each there is inserted by any number of recent opinions of the Supreme Court the "right of privacy." It appears better to say that this concept is in the "relationship" because it has not been placed firmly in any particular part of the Constitution. The Fourth Amendment has its own statement of privacy which has been considered above, and this is both as to things and as to a zone or area, which, as a place, obviously cannot be taken literally. But in any event, the "privacy" is there and it certainly bears on the *search* here conducted. The opinion of the court in Hill v. Philpott, 445 F.2d 144 (7th Cir.), as to the relationship between the amendments and the testimonial-compulsion is very persuasive and sound.

I would reverse.

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APPENDIX B

UNITED STATES DISTRICT COURT, D. COLORADO.

Civ. A. No. C-5039.

WENDELL L. SHAFFER and MARJORIE M. SHAFFER, *Plaintiffs*,

v.

ROBERT C. WILSON, Special Agent of the Internal Revenue Service, ET AL., *Defendants*.

Oct. 22, 1974.

Opinion and Order

CHILSON, District Judge.

From the complaint and affidavits filed herein, it appears that the Plaintiff Wendell L. Shaffer, in October 1971, was a dentist who for several years had been practicing in Colorado Springs, Colorado. The other Plaintiff, Majorie M. Shaffer, was his wife who assisted him in the conduct of his office. On October 21, 1971, a search warrant was issued by the United States Magistrate in Denver, authorizing the Defendants, Wilson and Bachman and other agents of the Intelligence Division, to search the place of business of Dr. Shaffer. On October 22, 1971, the search was made and a large number of documents were removed from the Plaintiff's office by the Defendants.

On May 24, 1973, this action was instituted, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure which provides for a motion for return of property and to suppress evidence obtained by an unlawful search and seizure, and also pursuant to 28 U.S.C. § 1331. (Federal question). The complaint prays for a return to the Plaintiffs of the originals and all copies of the items seized; an injunction prohibiting the United States Attorney from using the seized material or any information derived from it for prosecution of Dr. Shaffer, and the suppression of the

use of the seized material or any information derived from it in any proceeding for the determination of Plaintiff's tax liabilities.

Additionally, Plaintiffs pray for money damages in the amount of $12,000 from each of the named Defendants.

Upon application for a preliminary injunction, this Court enjoined the use of the seized material by Defendants and ordered it suppressed until further order of the Court. The Court then fixed a time for the parties to file affidavits and briefs in support of their respective positions.

Both Plaintiffs and Defendants have moved for summary judgment, alleging that there is no genuine issue of material fact involved and have supported their motions by appropriate briefs.

The Court determines that there is no genuine issue of material fact to be determined in order for the Court to determine the claims of the parties upon the merits.

Defendant Wilson's affidavit in support of his application for a search warrant set for his belief that the items to be seized would support a charge that Plaintiffs are in violation of 26 U.S.C. § 7201 and § 7206(1), tax evasion and filing false or fraudulent tax statements for the years 1966-70. Attached to Defendant Wilson's affidavit are affidavits of persons employed by Plaintiffs during various times between 1964 and 1970. These affidavits support Defendant Wilson's belief that Plaintiffs failed to include certain income in their tax returns. Throughout there are references to a dual bookkeeping system including a document called a "cheat book" in which it is alleged Plaintiff recorded payments received which were not included in Plaintiffs' tax returns.

Jurisdiction for Plaintiffs' claim for injunctive relief is alleged under Fed.R.Crim.Pro. 41(e) and 28 U.S.C. § 1331, and is apparently unchallenged by Defendants, although

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they deny that this is an appropriate case for invoking the Court's equity powers. Jurisdiction for Plaintiffs' claim for monetary damages is properly based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). See also, United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972).

The question of whether the seizure of personal financial books and records pursuant to an apparently valid search warrant violates the Fifth Amendment privilege against compulsory self-incrimination has a long history. A short review of this history will place the question in its proper perspective.

The United States Supreme Court first had occasion to consider the question in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). In that case the District Court ordered the defendant to produce an invoice that would allegedly establish his violation of the import duty statute and result in the forfeiture of illegally imported goods. The order to produce was issued pursuant to a statute, Act of June 22, 1874, § 5, 18 Stat. 187, which provided that should the defendant fail to produce the requested document, the allegations as to what the document would prove would be taken as confessed. Boyd v. United States, 116 U.S. at 620, 6 S.Ct. 524. Defendant complied with the order under protest, and later challenged the use of the invoice on Fifth Amendment grounds. In this context Justice Bradley characterized the issue before the Court as follows:

> The principal question . . . remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenues laws—is such a proceeding for such a purpose

> an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?

Boyd v. United States, 116 U.S. at 622, 6 S.Ct. at 528. Although this case arose in the context of an order to produce, the Court was of the opinion that this was equivalent to a search and seizure, Boyd v. United States, 116 U.S. at 634-635, 6 S.Ct. 524, and proceeded to analyse the situation in Fourth Amendment terms.

As background, the Court recognized that certain items to which the government is entitled have always been subject to search and seizure. Thus the seizure of stolen goods, and goods forfeited for breach of the revenue laws, or concealed to avoid payment of duties have always been seizable. Likewise, the government has always been permitted to search records required to be kept by the revenue laws and to search for and seize articles the possession of which is illegal. Boyd v. United States, 116 U.S. 623-624, 6 S.Ct. 524. However, the Court observed that:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not.

Boyd v. United States, 116 U.S. at 623, 6 S.Ct. at 528.

Justice Bradley continued with a discussion of the historical development of the Fourth Amendment. He explained in detail that the primary reason for the strict requirements of the Fourth Amendment was a reaction by the Founders against the common-law writs of assistance, or "general warrants," which were used to harrass and

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convict persons critical of the Crown. These general warrants were judicially invalidated in Entick v. Carrington, 19 How. St.Tr. 1029 (1765), a case involving a search for evidence of seditious libel. Lord Camden's analysis was based on what would later become Fifth Amendment concerns:

> "It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle . . . .
>
> '. . . the warrant to seize and carry away the party's papers in the case of seditious libel is illegal and void.'

Boyd v. United States, 116 U.S. at 629, 4 S.Ct. at 532.

With the *Entick* case as support, the Court stated its famous dictum concerning the "intimate relation" between the Fourth and Fifth Amendments:

> The principles laid down in this opinion [Entick v. Carrington] affect the very essence of constitutional liberty and security. . . . It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; *but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or forfeit his goods, is within the condemnation of that judgment.* In this

> regard the Fourth and Fifth Amendments run almost into each other. (Emphasis added)

Boyd v. United States, 116 U.S. at 630, 6 S.Ct. at 532. The Court thus *held* that the use of the order to produce in this case amounted to compulsory production of testimonial evidence forbidden by the Fifth Amendment. The Court's *dictum*, however, broadens its holding to include testimonial evidence obtained by a search warrant. Justice Miller recognized this anomoly in his concurring opinion. While he agreed that the use of the order to produce was a Fifth Amendment violation, he took care to point out that an order to produce is not a search and seizure within the Fourth Amendment.

> If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses, is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made.

Boyd v. United States, 116 U.S. at 641, 6 S.Ct. at 538.

The *Boyd* decision is the source of the "mere evidence" rule, which provided that the search for and seizure of "mere evidence" of crime, particularly the personal books and papers of the defendant, was unconstitutional as a result of the "intimate relation" between the Fourth and Fifth Amendments.

Professor Wigmore vigorously criticized the *Boyd* rule. He distinguished the Fourth and Fifth Amendments as having been adopted for different purposes. The Fifth Amendment should not be employed in an analysis of a search and seizure permitted by a Fourth Amendment warrant. In the case of a search and seizure pursuant to a validly authorized warrant, the suspect is "not required to act testimonially—he is not required to act at all, or

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even to be present when the evidence is obtained. Thus the reasons for the [5th Amendment] privilege do not apply." 8 Wigmore, Evidence § 2264, p. 384 (McNaughton rev. 1964). The proper treatment of a required production of documents is explained in 8 Wigmore, Evidence § 2264, pp. 379-80 (McNaughton rev. 1964):

> (1) . . . [T]he production of *documents* or *chattels* by a person . . . in response to a subpoena or to order production or to other form of *process relying on his moral responsibility for truthtelling,* may be refused under the protection of the [5th Amendment] privilege. This is universally conceded. . . . It is the witnesses' assurance, compelled as an incident of the process, that the articles produced are the ones demanded [which is the compelled testimonial act]. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. . . .
>
> (2) Furthermore, it follows that documents or chattels obtained from the person's control *without* the use of process relying in his truthtelling are *not* within the scope of the privilege. As Mr. Justice Holmes said [in Johnson v. United States, 228 U.S. 457, 458 (1913)], 'A party is privileged from producing the evidence but not from its production. (Emphasis in original)

Professor Wigmore thus believed that there is no compulsion, in the Fifth Amendment sense, attendant to the search for and seizure of documents pursuant to a warrant. Any implications to the contrary derived from the *Boyd* dictum, *supra,* are merely the product of confusion generated by that decision. See 8 Wigmore, Evidence § 2264, pp. 381-84 n. 4 (McNaughton rev. 1964) for a detailed discussion of the Boyd case. See also, Note, 6 Ga.L.Rev. 399 (1972).

In Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), the Court again considered the question presented in *Boyd*, but in different circumstances. In *Gouled* the defendants were charged with conspiracy to defraud the United States and with mail fraud. The case involved the admissibility of two types of documents in the prosecution. The first document considered was taken by a government agent from the office of one of the defendants by stealth without the defendant's knowledge and without a warrant. The Court held this document to be inadmissible since it was obtained by an illegal warrantless search and seizure, and such a search and seizure, followed by the use of the document at trial amounts to a violation of the defendant's privilege against compulsory self-incrimination under the Fifth Amendment. Gouled v. United States, 255 U.S. 298, 306, 41 S.Ct. 261, 65 L.Ed. 647 (1921).

The second group of documents was obtained pursuant to apparently valid search warrants. The Court began its analysis of these documents by reiterating that the government may not use a warrant to search a defendant's house or office for mere evidence of crime without first asserting a superior property right to the articles sought. Boyd v. United States, *supra*, 116 U.S. at 623-624, 6 S.Ct. 524; Gouled v. United States, 255 U.S. at 309, 41 S.Ct. 261. However, the Court then departed from the *Boyd* rationale and held that books and papers enjoy no greater protection than any other type of evidence.

> There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant.

Gouled v. United States, 255 U.S. at 309, 41 S.Ct. at 265.

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Thus, *Gouled* appears to have overruled *Boyd* insofar as *Boyd* ascribed any special significance to books and papers as the objects of a search and seizure. *Gouled* held (1) that the admission of testimonial evidence obtained by an *unlawful* search and seizure amounts to compulsory self-incrimination and will not be allowed; and (2) searches for and seizures of items to be used as mere evidence of crime would not be allowed unless the government could assert some superior right to the property. Evidence to which the government may assert a superior property right, and which is therefore subject to search and seizure includes the following: stolen goods and contraband, Boyd v. United States, 116 U.S. 616, 623-624, 6 S.Ct. 524 (1886); records required to be kept, compare Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948) with Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); and items fairly characterized as instrumentalities of crime, Marron v. United States, 275 U.S. 192, 198-199, 48 S.Ct. 74, 72 L.Ed. 231 (1927); Go-Bart Co. v. United States, 282 U.S. 344, 51 SCt 153, 75 L.Ed. 374 (1931); Gottone v. United States, 345 F.2d 165 (10th Cir.), cert. denied, 382 U.S. 901, 86 S.Ct. 234, 15 L.Ed.2d 155 (1965); United States v. Guido, 251 F.2d 1 (7th Cir.), cert. denied, 356 U.S. 950, 78 S.Ct. 915, 2 L.Ed.2d 843 (1958).

The first branch of the *Gouled* holding remains good law. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) and its progeny. The second branch, the distinction between mere evidence and property as to which the government can assert a superior property interest, however, has been expressly overruled in Warden v. Hayden, 387 U.S. 294, 300-310, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The Court explained:

> The survival of the *Gouled* distinction is attributable more to chance than considered judgment. Legislation has helped to perpetuate it. Thus, Congress has never authorized the issuance of search warrants for

> the seizure of mere evidence of crime. . . . Even in the Espionage Act of 1917, where Congress for the first time granted general authority for the issuance of search warrants, the authority was limited to fruits of crime, instrumentalities and certain contraband. 40 Stat. 228. *Gouled* concluded, needlessly it appears, that the Constitution virtually limited searches and seizures to these categories.[1]

The Court went on to reject the mere evidence rule, explaining that the proper concern is not with the characterization of the particular property seized as mere evidence, instrumentalities, fruits or contraband, but with the extent to which the individual's privacy is compromised in obtaining the evidence. The Fourth Amendment itself is sufficient to secure adequate protection of the individual's privacy. Assuming that there is a "nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior," Warden v. Hayden, 387 U.S. at 307, 87 S.Ct. 1642, 1650, invasions of privacy pursuant to a properly obtained search warrant

> are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a neutral and detached magistrate. . . .' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 [(1948)]. The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband.

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[1] "Significantly, Entick v. Carrington itself has not been read by the English courts as making unlawful the seizure of all papers for use as evidence. See Dillon v. O'Brien, 20 L.R.Ir. 300; Elias v. Pasmore, [1934] 2 K.B. 164." (Court's footnote).

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Warden v. Hayden, 387 U.S. at 309-310, 87 S.Ct. at 1651. The Supreme Court's repudiation of the mere evidence rule is now reflected in 18 U.S.C. § 3103a and Fed.R.Crim. Pro. 41(b).

Warden involved the search for and seizure of clothing incident to the defendant's arrest. The Court was careful to point out, therefore, that its holding must be read in light of its facts and that:

> This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

Warden v. Hayden, 387 U.S. at 303, 87 S.Ct. at 1648.

However, reading *Warden* in light of *Gouled's* statement that "[t]here is no special sanctity in papers, as distinguished from other forms of property," Gouled v. United States, 255 U.S. at 309, 41 S.Ct. at 265, it is clear that the Court's caveat is intended to refer not to the particular nature of the items to be seized, but instead to a narrow class of property which is intimately connected to vitally protected individual privacy rights. See e.g., Roe v. Wade, 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and cases cited therein. See, Comment, 6 Loyola of L.A.L. Rev. 274, 303-304 (1973); Model Code of Pre-Arraignment Procedure § SS1.03(2) (Tent.Draft No. 4, 1971) (personal diaries, letters or other private writings made solely for personal use or commuications to a person occupying family or privileged relationship, other than in furtherance of crime, may not be subject of search and seizure).

With this history as a basis, the various Circuit Courts of Appeal have considered the issue and arrived at no less than four different conclusions.

(1) United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), cert. denied sub nom Thomas v. United States, 402 U.S. 984, 91 S.Ct. 1670, 29 L.Ed.2d 149 (1971), involved the

search, incident to arrest, of the defendant's apartment. The defendant was accused of conspiracy to import and distribute narcotics in violation of 21 U.S.C. §§ 173-174. The search produced, *inter alia,* a letter which incriminated the defendants. The Court upheld the seizure of the letter relying largely on Warden v. Hayden, *supra.*

> We find no distinction of constitutional dimensions between the seizure of Hayden's clothing and of Egan's letter. While the demise of the 'mere evidence' rule may well require the development of some new restriction on allowable search and seizure in its place, we suggest with deference that an approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized. . . . Despite Mr. Justice Bradley's dicta in *Boyd* . . . now largely repudiated by *Hayden,* . . . the Fourth Amendment does not protect broadly against the seizure of things whose compulsory production would be forbidden by the Fifth. . . . [N]o one could have seriously asserted, even before *Hayden,* that the Fourth Amendment protected such papers against seizure pursuant to a search warrant or a reasonable search incident to a lawful arrest.

United States v. Bennett, 409 F.2d at 896-897. See also, United States v. Scharfman, 448 F.2d 1352 (2d Cir. 1971), cert. denied sub nom. Scharfman v. United States, 405 U.S. 919, 92 S.Ct. 944, 30 L.Ed.2d 789 (1972). Thus the Court took the position that no item is inherently unseizable, pursuant to a valid warrant or incident to a lawful arrest, unless its seizure compromises the defendant's Fourth Amendment rights. Judge Friendly explained this proposition relying on Judge Learned Hand's opinion in United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) as follows:

> Judge Hand's . . . statements afford the best clue to the formulation of any new limitation that we have been

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> able to conceive. As he observed, the vice lies in the unlimited search. The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I Have Performed.' Similarly the abhorrence generally felt with respect to 'rummaging' through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view.

United States v. Bennett, 409 F.2d at 897.

(2) Hill v. Philpott, 445 F.2d 144 (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 533, 30 L.Ed.2d 5 (1971), and VonderAhe v. Howland, 31 A.F.T.R. 73-1075 (9th Cir. 1973) are remarkably similar to the case under consideration. Both cases held that personal books and records of suspected tax evaders cannot be obtained by the use of search warrants because of the Fifth Amendment prohibition against compulsory self-incrimination. Defendants summarize the situation in their Memorandum at p. 4 as follows:

> Stated as candidly as possible, the defendants believe that *VonderAhe* and *Hill* are factually indistinguishable from this case. Indeed the operative facts in the three cases are eerily similar. It follows, therefore, and the defendants concede that if this Court elects to follow the law of the Seventh and Ninth Circuits it should rule for the plaintiffs with respect to suppression of the seized evidence.
>
> The defendants believe, however, that *Hill* and *VonderAhe* are legally incorrect and should not be followed.

In *Hill, supra*, the Seventh Circuit upheld the defendant's motion to suppress the seized papers and documents on

Fourth and Fifth Amendment grounds. The Court rejected Wigmore's analysis of the two Amendments, *supra,* and relied on *Boyd, Gouled* and *Warden, supra,* and Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), for the proposition that papers and documents which are not subject to production by subpoena on Fifth Amendment grounds similarly cannot be the objects of a search and seizure with or without a warrant. Hill v. Philpott, 445 F.2d at 146-149. Thus the Court held that the use of a search warrant to obtain testimonial evidence is equivalent to compulsion within the Fifth Amendment. Hill v. Philpott, 445 F.2d at 148-149. But see Romanelli v. Commissioner, 466 F.2d 872, 877-878 n. 9 (7th Cir. 1972) (*Hill* inapplicable where papers and documents seized were "paraphernalia of illegal gambling" and instrumentalities of crime).

Judge Fairchild, dissenting in *Hill,* read the caveat in Warden v. Hayden, *supra,* as intended only to protect "a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy." Hill v. Philpott, 445 F.2d at 150. He did not feel that the papers involved in *Hill* were within this special class. In this respect Judge Fairchild agreed with the analysis of Warden v. Hayden, *supra.*

VonderAhe v. Howland, *supra,* followed the reasoning of *Hill* with one addition. While *Hill* found the use of a search warrant to be the equivalent of compulsion due to "the realities of trial" Hill v. Philpott, 445 F.2d at 149, *VonderAhe* found compulsion based on speculation about the practical consequences of administering search warrants:

> One need ask only what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be broken down, he would

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be placed under arrest, and the desired material would be seized. How the imminence of such force can be considered as anything other than compulsion escapes us.

VonderAhe v. Howland, 31 A.F.T.R. at 73-1079.

(3) United States v. Blank, 459 F.2d 383 (6th Cir.), cert. denied, 409 U.S. 887, 93 S.Ct. 111, 34 L.Ed.2d 143 (1972), involved the search for and seizure of books and records of an alleged horse-book gambling business as defined in 18 U.S.C. § 1955. The search and seizure was conducted pursuant to an admittedly valid warrant. On the defendant's challenge to the search and seizure, the 6th Circuit considered and expressly rejected the rationale of Hill v. Philpott, *supra,* United States v. Blank, 459 F.2d at 384-385. The Court accepted Professor Wigmore's view that there is no compulsion, in the Fifth Amendment sense, attendant to a search and seizure conducted in accordance with a validly obtained search warrant. See Wigmore, Evidence § 2264 (McNaughton rev. 1964), *supra.* The Court agreed with Judge Fairchild's dissenting view in *Hill,* that the caveat in Warden v. Hayden, *supra,* applies only to items intimately related to the defendant's Fourth Amendment privacy rights such as is the case with a "closely held diary." United States v. Blank, 459 F.2d at 386-387 (also citing Model Code of Pre-Arraignment Procedure § SS1.03(2), *supra.*) Since the papers and documents were seized without compulsion, were business rather than personal records, and were also instrumentalities of the alleged crime involved, the Court reversed the District Court and held the records to be admissible as evidence. United States v. Blank, 459 F.2d at 387. Accord, United States v. Curreri, 368 F.Supp. 757, 765 (D.Md. 1973).

(4) Taylor v. State of Minnesota, 466 F.2d 1119 (8th Cir. 1972), involved the seizure of an incriminating memorandum from defendant's apartment. The Court denied

defendant's claim that the seizure violated his Fifth Amendment rights because the evidence did not "show the memorandum to have been the product of any coercion." Taylor v. State of Minnesota, 466 F.2d at 1121. See Hoffa v. United States, 385 U.S. 293, 303-304, 87 S.Ct. 408, 17 L. Ed.2d 374 (1966); United States v. Hanon, 428 F.2d 101, 107 (8th Cir. 1970).

A consideration of all of these cases leads to the conclusion that the search for and seizure of the books and records in this case was not improper. Notwithstanding the rationale advanced by *Hill* and *VonderAhe, supra,* it appears that there was no compulsion, in the Fifth Amendment sense, attendant to the search and seizure in this case. The requirements of the Fourth Amendment for obtaining a warrant were complied with in all respects, and having been met, the requirements were sufficient to protect Plaintiffs' rights. See Warden v. Hayden, *supra,* 387 U.S. at 307-310, 87 S.Ct. 1642. This view of the situation is consistent with the approaches taken in United States v. Bennett, United States v. Blank, Taylor v. State of Minnesota, Wigmore, and the law review commentaries noted *supra.*

Moreover, the articles seized by defendants were business records rather than private papers which are "so much a part of personhood that they ought to enjoy a superlative privacy." Hill v. Philpott, 445 F.2d at 150 (dissenting opinion of Judge Fairchild). The affidavits appended to Defendant Wilson's application for a search warrant reveal that at least Plaintiff's employees and former employees had knowledge of these records. Thus, the items seized were not private, but rather "business records of which other persons must have knowledge." United States v. Blank, 459 F.2d at 387.

Plaintiffs' second claim, for damages resulting from an unconstitutional search and seizure, must fall with the first claim. Since the search and seizure cannot be said to have been improper, Plaintiffs are not entitled to damages.

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A fair reading of the search warrant and the inventory of items taken from Plaintiff's office (see Defendant Wilson's affidavit) reveals that there was a reasonable "nexus . . . between the item . . . seized and [the] criminal behavior" alleged. Warden v. Hayden, *supra*, 387 U.S. at 307, 87 S.Ct. at 1650.

It is therefore ordered that the Defendants' motion for summary judgment be and the same is hereby granted; the cross-motion of the Plaintiffs for summary judgment is hereby denied, and judgment shall enter in favor of the Defendants against the Plaintiffs for the Defendants' costs to be taxed by the Clerk of the Court upon the filing of a bill of costs.

It is further ordered that the preliminary injunction entered by the Court on July 5, 1973, is hereby dissolved.

Final judgment shall be entered accordingly.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Magistrate's Docket No. 2

Case No. 463

UNITED STATES OF AMERICA

v.

PREMISES, 817 WEST COLORADO AVENUE, COLORADO SPRINGS, COLORADO, being the entire first floor of the building on the premises known as 817 West Colorado Avenue, Colorado Springs, Colorado.

Search Warrant

To Robert C. Wilson, T. Paul Bachman, or any other Special Agent of the Intelligence Division, Internal Revenue Service.

Affidavit having been made before me by Robert C. Wilson, a Special Agent of the Intelligence Division, Internal Revenue Service, that he has reason to believe that on the premises known as 817 West Colorado Avenue, Colorado Springs, Colorado, being the entire first floor of the building on the premises known as 817 West Colorado Avenue, Colorado Springs, Colorado, on information believed to be occupied as the dental offices of Wendell L. Shaffer, D.D.S., in the Judicial District of Colorado, there is now being concealed certain property, namely fiscal records relating to the income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources from January 1, 1966, to December 31, 1970, including, but not limited to, dental patient cards, appointment books, cash receipts books, cash disbursements books, expense records, business ledgers, log books, bank ledger sheets and statements, deposit tickets, cancelled checks, purchase invoices, copies of receipts

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covering payments of fees, copies of invoices and bills sent to patients of the aforesaid Doctor, an approximately 5½" by 7", or other dimensioned, paper pad, on which various dates, names, and amounts, and other notations are recorded and allegedly known as a "cheat book," and diverse other records of financial transactions which have been used in violating the provisions of the Internal Revenue laws or regulations prescribed thereunder, particularly Sections 7201 and 7206(1) of said Internal Revenue laws (Title 26 U.S.C.). Said records also comprise evidence of criminal offenses in violation of these laws of the United States within the meaning of Section 3103(a), 18 U.S.C. and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of October, 1971.

/s/ ROYCE D. SICKLER
U. S. Magistrate

Certified a True Copy
/s/ ROYCE D. SICKLER
United States Magistrate